In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 435

GIUSEPPE GAGLIANO, PETITIONER

v.

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 31-32; App. B) [1] is reported at 222 F. 2d 958.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1955 (R. 33; App. C), and a petition for rehearing (R. 34-38) was denied on August 16, 1955 (R. 39; App. D). The petition for a writ

[1] "App." refers to the Appendix to the petition for certiorari.

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of certiorari was filed on September 29, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien, convicted of a narcotics violation in 1927 and not deportable by reason of that conviction prior to the Immigration and Nationality Act of 1952, was deportable under Sections 241(a)(11) and 241(d) of the 1952 Act, or whether he had a non-deportable status preserved under the savings clause of the 1952 Act, Section 405(a).

STATUTES INVOLVED

Section 241(a)(11) of the Immigration and Nationality Act of 1952 [8 U.S.C. 1251(a)(11); 66 Stat. 206] provides:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production,

compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;

Section 241(d) [8 U. S. C. 1251(d); 66 Stat. 208] provides:

> Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Section 405(a) [8 U. S. C. 1101, Note; 66 Stat. 280] provides:

> Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at

> the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

STATEMENT

Petitioner, a 50-year old citizen of Italy, entered the United States as a deserting seaman on April 9, 1921 (R. 3, 4). On June 29, 1927, he was convicted in the District Court of the United States for the Southern District of New York, on his plea of guilty, to unlawful sale of heroin, and he served a sentence of imprisonment for 12 months (R. 4, 9). On October 25, 1939, the District Director, New Orleans District, Immigration and Naturalization Service, wrote petitioner a letter reading as follows (App. E):

> Referring to deportation proceedings instituted against you by this Office, you are informed that our Central Office under date of the 16th instant canceled Warrant of Arrest in your case. The matter is therefore considered closed.

After enactment of the Immigration and Nationality Act of 1952, which declared deportable any alien "who at any time has been convicted" of a violation of the narcotic laws (Sec. 241(a)(11), *supra,* p. 2), petitioner was given a hearing and ordered deported on that ground (R. 3). This deportation order was affirmed by the Board of Immigration Appeals on January 29, 1954 (R. 3).

Petitioner then instituted in the District Court at New Orleans a habeas corpus petition (R. 2-12), asserting that the deportation order was null and void for various reasons not now pertinent.[2] The respondent filed a return and attached the official Immigration Service file of the deportation proceedings (R. 15-17). The District Court ordered the writ of habeas corpus discharged (R. 17-20).

On appeal, petitioner contended that section 241(a)(11) of the 1952 Act, when considered in the light of the savings clause (Section 405(a), 8 U.S.C. 1101 note, *supra,* p. 3), should not be construed to destroy his status as a non-deportable resident alien. The Court of Appeals rejected this contention and affirmed the order of the District Court (App. C).

ARGUMENT

Petitioner's principal contention is that at the time of the 1952 Act he enjoyed a status as a non-deportable resident alien, which was preserved to

[2] The contentions urged in the habeas corpus petition were later foreclosed by the decision of this Court in *Marcello* v. *Bonds,* 349 U.S. 302.

him by the savings clause of the 1952 Act, Section 405(a).

1. First, we must disagree with petitioner's initial argument that he acquired an adjudicated status as a non-deportable alien by reason of the 1939 letter of the District Director of the Service, *supra*, p. 4 (Pet. 2, 8; App. E). Under the law and regulations then in effect (see 8 C. F. R. [1938 Ed.] 19.6, 19.12), an alien was entitled to a full hearing on the question of his deportability. The record does not disclose any hearing determining that petitioner was not deportable; it shows only that the warrant of arrest was cancelled. This did not foreclose a later deportation proceeding against petitioner under a new warrant. Cf. *Mahler* v. *Eby*, 264 U.S. 32, 46; *Bilokumsky* v. *Tod*, 263 U.S. 149, 158. And even if petitioner had been granted a hearing administratively determining that he was then non-deportable, such a ruling would not have been *res judicata* in the technical sense. Cf. *Pearson* v. *Williams*, 202 U.S. 281.

2. Secondly, petitioner is clearly deportable under the 1952 Act, and the savings clause does not help him. Section 241(a)(11) of the 1952 Act (*supra*, p. 2) provides for the deportation of an alien "who at any time" has been convicted, as in the petitioner's case, for the illegal sale of heroin. Section 241(d) (*supra*, p. 3) unequivocally shows that Section 241(a)(11) applies even though the facts upon which deportation is predicated "occurred prior to the date of enactment of this Act." The retroactive application of the new grounds for

deportation in Section 241(a)(11) was expressly upheld as constitutional in *Marcello* v. *Bonds*, 349 U. S. 302, 314.

In view of the specific provisions of Section 241(a)(11) and 241(d), involving considerations "more compelling than the preservation of the status quo" (cf. *Shomberg* v. *United States*, 348 U. S. 540, 547-548), there is no occasion to apply the savings clause of Section 405(a). Section 405 (a) only controls "unless otherwise specifically provided" in the Act (*supra*, p. 3), and even if the savings clause would otherwise be applicable, Section 241(d) is a provision "otherwise specifically provided" which clearly carves out an exception. Cf. *Shomberg* v. *United States*, 348 U. S. 540. The express provisions of Sections 241(a)(11) and 241(d), in themselves, bring this case within the rationale of *Shomberg* rather than of *United States* v. *Menasche*, 348 U. S. 528, relied upon by petitioner (Pet. 6).[3]

3. Petitioner's reliance upon *United States ex rel. DeLuca* v. *O'Rourke*, 213 F. 2d 159 (C. A. 8), and *Ex parte Robles-Rubio*, 119 F. Supp. 610 (N. D. Cal.), is misplaced (Pet. 6-7). Both involved judicial recommendations of non-deportability under express statutory authority, (8 U. S. C. [1940 Ed.] 155(a)), whereas here there was not even an authoritative administrative determination of petitioner's non-deportability (see *supra*, p. 6). Moreover, the two cases presented

[3] See, also, Brief for the Respondent, *Pino* v. *Landon*, No. 333, October Term, 1954, at pp. 42-47.

quite a different substantive issue f[rom that in-]
volved here. Section 241(a)(4) of t[he 1952 Act]
provides for deportation of aliens [convicted of]
crimes involving moral turpitude, wit[hout stating]
whether this includes or excludes na[rcotics viola-]
tions; Section 241(a)(11) covers de[portation of]
aliens violating narcotics laws; and Se[ction 241(b)]
provides that a timely recommendatio[n by the sen-]
tencing judge against deportation sha[ll make Sec-]
tion 241(a)(4) inapplicable. It was [therefore de-]
batable whether a sentencing judge's [recommenda-]
tion prior to the 1952 Act—although [not expressly]
declared by the Act to remain effectiv[e to preclude]
deportation under Section 241(a) [(11)—could]
nevertheless be given such effect, on [the ground]
that narcotics violations are a spe[cial class of]
crimes involving moral turpitude co[vered by Sec-]
tion 241(a)(4). In resolving this c[lose question]
favorably to the aliens, the court in ea[ch case found]
justification for resort to the saving[s clause, Sec-]
tion 405(a), to support its result.[4]

4. Since the result reached below [is clearly cor-]
rect, it is immaterial whether the [court below]
properly deemed that the question [here involved,]
"whether formally presented and a[rgued or not,]
was implicitly foreclosed" by the *Ma[rcello* decision]
(App. B). But see *Stainback* v. *Mo[Hock Ke Lok*

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[4] *Yanish* v. *Barber*, 211 F. 2d 467 (C.A. 9) [see Pet. 7], which does not involve a narcotics violatio[n or a claim of non-deportable status as in the instant case upheld the con-]tinuing effectiveness of a subsisting injunc[tion despite the advent of the 1952 Act.]

Po, 336 U. S. 368, 379-380, and *Murray* v. *Roberts,* 103 F. 2d 889, 894-895 (C. A. 2), recognizing implications in express judicial holdings. There is no more reason for the Court to grant certiorari now than there was when it denied Marcello's supplemental petition for certiorari on the identical point, making the same arguments advanced here. 348 U. S. 805.

CONCLUSION

The decision of the court below was correct and there is no conflict in decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1955.

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